

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 309/08
5127468

BETWEEN RAEWYNNE MURFITT
 Applicant

AND KARAPIRO MANAGEMENT
 LTD
 Respondent

Member of Authority: Vicki Campbell

Representatives: Raewynne Murfitt in Person
 No appearance for Respondent

Investigation Meeting 21 August 2008 at Hamilton

Determination: 28 August 2008

DETERMINATION OF THE AUTHORITY

Mediation

[1] This matter was referred to mediation on 4 July 2008. Following several failed attempts to make contact with the respondent the Mediation Service referred the matter back to the Authority for investigation. Given the circumstances I concluded that directing the parties to attend mediation would be an exercise in futility.

[2] The respondent has failed to file a statement in reply. In a minute dated 31 July 2008 the Respondent was advised that the matter had been set down and reminded that should it attend the investigation meeting it would require leave to reply or respond to Ms Murfitt's application. The Notice of Investigation Meeting sets out the consequences for the Respondent if it does not attend the investigation meeting.

[3] As at the scheduled commencement time for the investigation meeting, no representative of Karapiro Management Limited ("KML") was present. I am satisfied KML received the notice of investigation meeting. The Authority contacted Mr Kieran Fitzsimmons, a Manager and the Authority's contact person for the

respondent. Mr Fitzsimmons advised the Authority that there would be no representative of the respondent attending the investigation meeting.

[4] KML has not shown good cause for its failure to appear to be represented. I proceeded under clause 12 of Schedule 2 to the Employment Relations Act 2000 to hear and determine the matter as if KML had attended or been represented.

Employment Relationship Problem

[5] Ms Murfitt commenced employment as the Human Resources Administrator for Karapiro Management Limited trading as Karapiro Wellness Centre and Resort on 4 February 2008. There is no written employment agreement between the parties.

[6] At her interview, Ms Murfitt was offered the position of HR Administrator at the rate of \$20.00 per hour. It was agreed that she would work from home for a total of 40 hours per week.

[7] On her first day of employment Ms Murfitt was given a letter of appointment. The letter stated that documents were to have been attached to the letter including two copies of an Individual Employment Agreement for signing. However, despite other documents referred to in the letter, being attached, there was no written agreement.

[8] In spite of requesting copies of the employment agreement, nothing was forthcoming. On 18 March 2008 Ms Murfitt wrote to the respondent formally requesting her employment agreement, but to no avail.

[9] When asked by her Manager, Ms Cami Arend, why she wanted an employment agreement Ms Murfitt advised her that she wanted the opportunity to negotiate on the use of her personal equipment which she was using for company purposes. For example, Ms Murfitt was using her personal laptop and personal cell phone. In response Ms Murfitt says Ms Arend said she would get right on it, and that the agreement would be for the positions of Human Resource Administrator and Events Manager.

[10] On Thursday 1 May 2008 Ms Murfitt was advised by Ms Arend that she was to be laid off with immediate effect. The following day, and on several occasions

after her dismissal, Ms Murfitt made written requests that she receive written confirmation of her dismissal and that she be paid at least two weeks wages in lieu of notice. After making a number of requests, including the provision of a payroll record which incorporates the two weeks notice and holiday pay, Ms Murfitt received a letter on 27 May 2008 which is dated 1 May, in which Ms Arend advises:

It is with sincere regret that I present you with this letter. Due to unforeseen circumstances, the development company assigned the task of completing the building of Karapiro Wellness Resort has been delayed in completing the project. While all prospects are being sought out to finish the project and hand it over to the operations company as quickly as possible, this could take time.

The operational company must now put the project on hold until the development company can complete the facilities. Because of this, you will be laid off from your position as HR Administrator/Events Manager with the Karapiro Wellness Resort effective at 5.00pm on 15th May 2008.

Effective immediately, you will be granted preference for re-employment to any active and vacant position from which you were laid off and for which you are qualified, so long as the position is at the same salary range level or lower, and is at the same percentage of time or less as the position from which you are being laid off.

Final pay

[11] On 8 May 2008, Ms Murfitt forwarded her final time sheet to Ms Arend in order that her final pay could be made up. Ms Murfitt recorded the hours she had worked during her final week, two weeks notice and a calculation for the payment of holiday pay at 8% of gross earnings. The total outstanding amount is \$3,360.00 gross.

[12] On the basis of the letter provided to Ms Murfitt from Ms Arend on 27 May 2008, it is clear Ms Murfitt was entitled to receive two weeks pay in lieu of notice. Ms Murfitt is also entitled to be paid for the hours she worked and her outstanding holiday pay.

[13] Ms Murfitt received \$1,000 from KML on the Respondent's misapprehension that that is all Ms Murfitt was due. I have taken this payment into account when making my orders for the payment of the arrears of wages.

Karapiro Management Limited is ordered to pay to Ms Murfitt the sum of \$2,360.00 gross within 28 days of the date of this determination.

The redundancy

[14] Ms Murfitt claims that she was treated unfairly when she was made redundant and seeks remedies. In reaching any conclusions with regard to this aspect of Ms Murfitt's claim the Authority is required to scrutinise KML's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[15] The test of justification does not change the longstanding principles about justification for redundancy (see *Simpson Farms v Aberhart* [2006] 1 ERNZ 825).

[16] The Authority must be satisfied on two general points – that the business decision to make a position redundant in this case was made genuinely and not for ulterior motives; and that the respondent acted in a fair and open way in carrying out that decision – particularly, did it consult properly about the proposal to make Ms Kinzett redundant and otherwise act in a way that was not likely to mislead or deceive her, that is, in good faith?

Was the redundancy genuine?

[17] The Court of Appeal in *GN Hale & Son Ltd v Wellington Caretakers IUOW* [1991] 1 NZLR 151, cemented an employers right to:

...make his business more efficient, as for example by automation, abandonment of unprofitable activities, re-organisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have the right to continued employment if the business could be run more efficiently without him.

[18] Further, the Employment Court in *Simpsons Farms* reiterated the right of an employer to make genuine commercial decisions relating to how its business operations will function including decisions to make positions or employees redundant. A genuine redundancy is determined in relation to the position, not the incumbent (*NZ Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739).

[19] KML was building a Wellness Resort at Karapiro. Building had not been completed when Ms Murfitt was employed and she acknowledged at the investigation meeting that the resort has never been operational. Ms Murfitt told me she was aware that the operations part of the company had experienced some difficulties but there had been no indication that jobs were in jeopardy.

[20] Ms Murfitt's manager, Ms Arend was also made redundant in May 2008. I don't understand Ms Murfitt to be disputing the necessity for the redundancies. Therefore, on the evidence available to me I am satisfied the redundancy situation at KML was for genuine commercial reasons.

Was the redundancy handled in a procedurally fair manner?

[21] Section 4 of the Employment Relations Act 2000 requires KML to deal with Ms Murfitt in good faith. This duty is to be exercised not only generally but in specific situations including redundancy.

[22] The duty of good faith set out in the Act requires an employer who is proposing to make a decision that will have an adverse affect on the continuation of employment of an employee to provide to that employee, access to information relevant to the continuation of the employee's employment, about the decision, and an opportunity to comment on the information before the decision is made.

[23] In this case the lack of any process is quite apparent. Ms Murfitt gave unequivocal evident that 1 May 2008 was the first indication she had that jobs were in jeopardy and that was the day she was dismissed. This was essentially a summary dismissal, with Ms Murfitt having to urge the Respondent to provide some form of notice. Further, Ms Murfitt was of the understanding that the lay off would be temporary and that she would be able to come back to her job in a couple of months.

[24] This never eventuated and it was only after it became obvious to Ms Murfitt that her job would not be available in the near future, that she started seeking alternative employment.

[25] The Respondent has failed to demonstrate that it acted in good faith toward Ms Murfitt in undertaking its redundancy process. Further, there was no opportunity for Ms Murfitt to have input into the decision affecting her employment.

[26] An employer acting fairly and reasonably in the circumstances of this matter would have discussed the urgent need for restructuring with Ms Murfitt and discussed options with her before the final decision to dismiss was made. Businesses do not fail overnight and Ms Murfitt was entitled to gain an understanding of the issues and the potential impact on her.

[27] In conclusion, I find that Ms Murfitt was unjustifiably dismissed from her employment on 1 May 2008 because the process adopted in dismissing her from her employment was not what a fair and reasonable employer would have done in all the circumstances that existed at that time.

[28] Ms Murfitt has a personal grievance that she was unjustifiably dismissed from her employment with Karapiro Management Limited.

Remedies

[29] I have found Ms Murfitt's redundancy to have been a genuine redundancy. The business has failed to open its planned Wellness Centre. It follows that ongoing lost wages can not be claimed, nor can Ms Murfitt be compensated for the loss of her job. However she can be compensated for the failure of the Respondent to properly consult.

[30] I accept that Ms Murfitt suffered injured feelings and a deep sense of frustration when she was dismissed. In all the circumstances, I find that a suitable sum for compensation for Ms Murfitt under s.123(1)(c)(i) of the Act is \$3,000.

Karapiro Management Limited is ordered to pay to Ms Murfitt the sum of \$3,000.00 within 28 days of the date of this determination being compensation.

[31] The Authority is bound by s.124 of the Act to consider the extent to which the actions of Ms Murfitt contributed towards the situation that gave rise to her personal grievance, and if those actions so require, to reduce the remedies. I am

satisfied Ms Murfitt has not contributed to the actions giving rise to her personal grievance. It follows that the remedies awarded to Ms Murfitt will not be reduced.

Costs

[32] Ms Murfitt shall have the lodgement fee on this application.

Summary of orders

[33] Karapiro Management Limited is ordered to pay Ms Murfitt the following amounts:

- \$2,360.00 gross for outstanding wages;
- \$3,000.00 compensation for unjustified dismissal;
- \$70.00 filing fee on this application

Vicki Campbell
Member of Employment Relations Authority